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No. 91-824

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

RALLY'S INC.,

Petitioner,

vs.

INTERNATIONAL SHORTSTOP, INC., AND SAM TALKINGTON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Petitioner Rally's, Inc. ("Rally's") is trying to make much over nothing. As to Rally's first issue, asserting the existence of a purported conflict among the circuits about the weight to be given intermediate state appellate court opinions, the two intermediate state court opinions that supposedly should have been followed by the Fifth Circuit did not even decide the state law question presented here, and numerous other authorities, including Texas Supreme Court opinions, support the Fifth Circuit's holding about state law. As to the second issue, concerning a

conflict about the necessity for a Rule 56(f) affidavit, an affidavit was filed in this case.

I.

There Is Not A "Wide Split" Among The Circuits About Whether To Follow State Intermediate Appellate Court Decisions, As Petitioner Rally's Alleges, And Several Other Reasons Also Dictate Denial Of The Writ On This Issue.

Both the circuit and district courts in this case rejected Rally's contention that Texas law provides an absolute privilege defense for tortious interference with a contract by the filing of a lawsuit. Rally's nonetheless continues its quest for absolute privilege protection before this Court by mischaracterizing Texas law. It ignores controlling precedent emanating from the Texas Supreme Court and from intermediate appellate courts, erroneously asserts that two distinguishable intermediate appellate court decisions concerning the filing of lis pendens notice are determinative of Texas law and should have been followed by the circuit and district courts, then wrongly represents that there is a "wide" and "substantial" conflict among the circuits about the consideration given by federal courts to intermediate state appellate court decisions.

There is *not* a conflict among the circuits. Moreover, the circuit and district courts correctly rejected Rally's "absolute privilege" contention. For these and other reasons delineated below, Rally's petition for writ of certiorari should be denied.

A. There Is No Split Among The Circuits About The Consideration Given To Intermediate State Appellate Court Decisions.

Rally's discusses principles enunciated by this Court in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). There, the federal circuit court declined to follow an intermediate state appellate court opinion on the same issue decided in an earlier phase of the same litigation. 311 U.S. at 231, 233-34. This Court said,

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former to ascertain *from all the available data* what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. . . .
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, *that is a datum for ascertaining state law* which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

311 U.S. at 236-37 (all emphasis added unless otherwise noted).

Rally's cites *West* for the proposition "that a federal court is particularly bound to follow a state intermediate appellate court decision when the highest state court has refused to review the appellate court decision. *Id.* [at 237]." Petition, p. 9. Rally's then points out that the Texas Supreme Court declined review in one of the two distinguishable opinions on which it mistakenly relies. However, Rally's has misinterpreted *West* on this issue. Rather than the broad proposition asserted by Rally's, this Court held,

> This [weight to be given an intermediate state appellate court decision] is the more so where, as in this case, the highest court has refused to review the lower court's decision *rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court.*

311 U.S. at 237.

None of the circuit court opinions cited by Rally's contradict *West*, nor do the opinions exhibit a conflict among themselves. Petition, pp. 6-7. Most of the opinions cite *West* and reiterate its guiding principles, although at times in somewhat different wording. All of the opinions recognize that an intermediate state appellate court decision is a "datum" or indicator of state law which is to be considered when evaluating how the highest state court likely would decide an issue. Not surprisingly, the circuit courts sometimes have found a prior intermediate state appellate court decision to be compelling precedent and

sometimes they have not, usually either because the earlier decision was distinguishable or because other authorities convinced the court that the highest state court probably would decide the issue differently.

Rally's divides most of the circuits into supposedly distinct categories. It begins,

> Some of the United States Courts of Appeal, including the Second [sic], Fourth, and Seventh Circuits, have ruled that a federal court in a diversity action is *not* required to follow holdings of intermediate forum state appellate courts in the absence of a forum state's highest court decision on point. *See, e.g., Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1275 (2nd [sic] Cir. 1990); *Klippel v. U-Haul Co. of Northeastern Michigan*, 759 F.2d 1176, 1181 (4th Cir. 1985); *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990); *but see, Burrus v. Young*, 808 F.2d 578, 581-86 (7th Cir. 1986).

Petition, pp. 6-7 (emphasis in original).

Rally's over-generalizes the holdings in the cited opinions. None of the courts unequivocally adopted the proposition stated by Rally's. Conversely, however, *no* court has held that a prior state intermediate court opinion, which usually is being advanced by one party to the suit, must be blindly followed without considering whether it may be distinguishable, outdated, or for some other reason not indicative of the highest state court's likely decision. In *Ground Air Transfer*, for example, the First Circuit (not the Second Circuit, as identified in Rally's petition) held that prior intermediate state court

authority argued by a party to be applicable was distinguishable and, in any event, contrary to state statutory policy and thus not the highest state court's likely ruling. 899 F.2d at 1270, 1273-75. In *Klippel*, the Fourth Circuit declined to follow a prior intermediate state court decision because it appeared to diverge from opinions of the highest state court and had been criticized as "probably erroneous" in law review articles. 759 F.2d at 1181. The Seventh Circuit in *Indiana Harbor Belt* was confronted with a novel state law issue, and it found that discussions about that issue in two prior state intermediate court opinions were dicta and were based on an incorrect interpretation of a prior district court opinion in the case under review. 916 F.2d at 1176.

Rally's next "category" of cases is described as follows:

> Some of the Circuit Courts, including the Seventh, Tenth and Eleventh Circuits, have ruled that a federal court in a diversity action *must* follow forum state intermediate appellate court decisions. *See, e.g., Burrus v. Young*, 808 F.2d 578, 581 (7th Cir. 1986); *Weiss v. United States*, 787 F.2d 518, 525 (10th Cir. 1986); *Blanchard v. State Farm Mut. Auto Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990).

Petition, p. 7 (emphasis in original). Rally's again leaves a misimpression by its over-generalization. In *Burrus*, a habeas corpus case, the Seventh Circuit merely noted generally that the Wisconsin Court of Appeals in the underlying criminal appeal had decided a state law evidentiary question and that the parties agreed they were

"bound by the Wisconsin Court of Appeals' interpretation of state [evidence] law." 808 F.2d at 581. The Tenth Circuit in *Weiss* confronted a novel question of state law, without the benefit of any state appellate court decisions on point; the court observed that "[i]n predicting how a state's highest court would rule, federal courts must follow intermediate state court decisions, policies underlying the applicable legal principles, and the doctrinal trends indicated by these policies," as well as "policies, principles, and state court decisions on analogous areas of Colorado law. . . . " 787 F.2d at 525. In *Blanchard*, the parties stipulated that there was no controlling state appellate authority on the state law question in that case; the Eleventh Circuit noted a "division in the reasoning among" the intermediate state court decisions and certified the question to the state's highest court. 903 F.2d at 1399.

Rally's next "category" of circuit court opinions are cited for the proposition "that [a] forum state's intermediate appellate court decisions must be followed by a federal court sitting in diversity absent convincing evidence that the state's highest court would decide the issue differently." Petition, p. 7. Again, however, none of the holdings in the cited opinions conflict with the holdings in the decisions previously discussed. *McGowan v. University of Scranton*, 759 F.2nd 287, 290-91 (3rd Cir. 1985) (In deciding novel question of state law, federal court must forecast state law by considering "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data," and intermediate appellate court decisions are "not conclusive" but are "indicia of how the state's highest court might decide"

the question); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1140-41 (6th Cir. 1986); *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771-72 (9th Cir. 1985).

Finally, Rally's contends that the Fifth Circuit "is itself apparently split on this question," and it compares *Lavespere v. Niagra Machine & Tool Works, Inc.*, 920 F.2d 259 (5th Cir. 1990), with *Green v. Walker*, 910 F.2d 291 (5th Cir. 1990). Both of those opinions involved questions about Louisiana law, and both were authored by judges who had practiced in Louisiana and were familiar with Louisiana law. In *Lavespere*, several intermediate state court opinions espoused by one party were found to be distinguishable. *Lavespere*, 920 F.2d at 260-61. In *Green*, the court observed that it was not bound by a prior intermediate state court decision when there is "persuasive data that the highest court of the state would decide otherwise," and that this is particularly so in Louisiana where the principle of *stare decisis* is not considered controlling. *Green*, 910 F.2d at 294.

B. Rally's Did Not Previously Raise Any Complaint About A Purported Conflict And Never Gave The Court Of Appeals The Opportunity To Address This Claim.

Rally's removed this case to federal court from Texas state court, presumably preferring a federal forum for the adjudication of this Texas tortious interference lawsuit, but now at this late juncture raises for the first time a complaint about a supposed conflict among the circuits regarding the weight to be given to intermediate state court decisions. The Fifth Circuit in this case invited

briefs on the question of adherence to intermediate state court opinions, and the parties submitted briefs. Yet Rally's did not assert the existence of a conflict in either this brief or in its petition for rehearing. The failure to complain about this issue in the circuit and district courts further confirms that certiorari is not warranted.

C. Rally's Petition Is Wrong About Key Facts.

Several critical facts are omitted from or distorted by the factual statement in Rally's petition. Rally's fails to mention the summary judgment evidence demonstrating that Plaintiff-Respondent International Shortstop, Inc. ("Shortstop") began a fast food business with a distinctive "double drive-through" design *before* Rally's started a competing business. (R. 2008, 2010, 2225, 3224-25). Shortstop made an agreement to sell its fast food chain to Al Copeland of Al Copeland Enterprises, Inc., the owner of Popeye's, Inc. and Church's Fried Chicken, Inc. (R. 55, 1894-95, 1924-25, 2036, 2221). Although Rally's petition (p. 4) implies there was no agreement, both the district and circuit courts found that an agreement did exist. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1260 (5th Cir. 1991). This agreement was a double blow to Rally's: it would give a financial "shot in the arm" to Shortstop, a direct competitor (R. 2224), and it dimmed Rally's hopes of acquiring prime surplus franchise locations from Copeland. (R. 1998, 2110, 2685).

Rally's solution was to make denigrating comments about Shortstop to Copeland and to summarily file a frivolous trade dress lawsuit in a federal court in Arkansas. (R. 1961, 1983-84, 2222-23). As a result of the

Arkansas lawsuit filed by Rally's, Copeland refused to close on the contract and consummate the purchase of Shortstop. (R. 1900). Copeland testified that the Arkansas lawsuit interfered with the deal and adversely affected Shortstop's value and its expansion potential because prospective franchisees would refuse to invest in a company involved in litigation. (R. 1901, 1912-13). After the district court rendered summary judgment for Rally's in this suit, the United States District Court in the Arkansas suit issued an opinion finding against Rally's on all elements of Rally's tortiously interfering trade dress claim. (Brief of Appellant, Exhibit A). Following the Fifth Circuit's reversal and remand for trial in this case, the district court's judgment against Rally's in the Arkansas suit was affirmed by the Eighth Circuit in an unpublished opinion.

This fact-based controversy does not present any appropriate question for this Court.

D. The Fifth Circuit Correctly Followed Texas Tortious Interference Law.

Rally's claim that it is absolutely privileged to tortiously interfere by filing a lawsuit contravenes established Texas law, and the circuit and district courts properly so held. Those holdings are grounded in Texas Supreme Court opinions, intermediate court opinions, and other authorities.

In *Sakowitz, Inc. v. Steck*, 669 S.W.2d 105 (Tex. 1984), the Texas Supreme Court discussed the existence of a *qualified – not absolute* – privilege to interfere through threatened or actual litigation. *Id.* at 106-107; *see also Id.* at

109 (J. Wallace) ("It must be noted that the claimed privilege is not absolute, *but qualified* . . . ") (emphasis in original). In doing so, the court referred to *"good faith* litigants," meaning those who act with a motive "not regarded as malicious." *Id.* at 107. The court also specified that, to sustain a privilege defense for litigation that interfered with a contract, the defendant must have "asserted a *colorable claim*"; that is, the defendant must have had *"a well grounded and justifiable* belief of a right" to assert such a claim. *Id.*

After discussing the nature of the *qualified* privileged, the Texas Supreme Court expressly held that the privilege applies to both threatened *and actual* litigation: *"This privilege extends to the actual assertion or threatened assertion of rights." Id.* In direct support of this holding the Texas Supreme Court cited an earlier intermediate state court opinion in which the court applied a qualified privilege for both the threat and actual filing of suit, *Morris v. Jordan Financial Corp.*, 564 S.W.2d 180, 184 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e.); and elsewhere in *Sakowitz* the Supreme Court approvingly cited an opinion in which the intermediate court applied a qualified privilege for a lawsuit, *Terry v. Zachry*, 272 S.W.2d 157, 159 (Tex. Civ. App. – San Antonio 1954, writ ref'd n.r.e.). Other courts also have applied a qualified privilege for threatened and actual litigation. *Hahn & Clay v. A. O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963); *Hughes v. Houston Northwest Medical Center*, 680 S.W.2d 838, 842 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 1020 (1985) ("Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference").

The Texas Supreme Court recently issued an opinion that discusses tortious interference and privilege. *Victoria Bank and Trust Company v. Brady*, 811 S.W.2d 931 (Tex. 1991). Although the acts alleged to be privileged in that case did not involve litigation, the Texas Supreme Court reiterated the *Sakowitz* requirement that in order to be privileged the assertion of a claim must be based on "a colorable legal right." *Id.* at 939. Further, the court held that the privilege "only protects good faith assertions of legal rights." The Texas Supreme Court also quoted from a prior intermediate court opinion which held that "legal proceedings" or other interfering acts must be instituted "in good faith" to be privileged. *Id.* at 939-940. The Fifth Circuit relied in part on *Victoria Bank* in rejecting Rally's "absolute privilege" contention. 939 F.2d at 1270.

The Texas Supreme Court and intermediate court opinions discussed above are consistent with other authorities addressing tortiously interfering litigation. *See, e.g.*, 4 Restatement (Second) of Torts, § 767, pp. 30-31 (1979) (comments under "prosecution of civil suit") ("Litigation and the threat of litigation are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries"). Similar privilege principles are followed in numerous other jurisdictions and in Fifth Circuit decisions under the Noerr-Pennington doctrine. *See* Brief of Appellants, pp. 28-31.

Rally's relies heavily upon two Texas intermediate court decisions holding that the filing of a lis pendens notice is absolutely privileged in a suit for tortious interference. *Prappas v. Meyerland Community Improvement*

Assoc., 795 S.W.2d 794 (Tex. App. – Houston [14th Dist.] 1990, no writ); and *Griffin v. Rowden*, 702 S.W.2d 692 (Tex. App. – Dallas 1985, writ ref'd, n.r.e.). In both cases, however, the courts emphasized that the narrow issue decided was whether the filing of a lis pendens notice *alone* was absolutely privileged. *Prappas*, 795 S.W.2d at 795; *Griffin*, 702 S.W.2d at 693. The courts did not have before them the question of whether the filing of a lawsuit was absolutely privileged, contrary to Rally's representation in its petition, and, again, that question was answered in the negative in *Sakowitz* and other opinions. *See* 939 F.2d at 1269, n. 12. Furthermore, the rationale for providing absolute privilege protection for the filing of a lis pendens notice does *not* apply to the filing of a suit, as the district court observed in this case. (R. 585). The purpose of the privilege for lis pendens is to encourage the giving of record notice of suit to the public in general and in particular to prospective, unknowing purchasers of the property in dispute. A lis pendens notice is unrelated to the merits of a suit or the motive for filing suit.

E. State Law Permeates The Issue Raised By Rally's.

The only statutory or constitutional provision identified by Rally's as being involved in the disposition of the petition is the Texas constitutional "open courts" provision. Petition, p. 2. Rally's also devotes considerable discussion (pp. 10-12) to this provision, which states,

> All courts shall be open, and every person for an injury done him, in his lands, goods, personal reputation, shall have remedy by due course of law.

Tex. Const. art. I, § 13. As is obvious, the express language of the constitution does *not* require application of an absolute privilege, and, again, *Sakowitz* and numerous other cases have adopted only a qualified privilege for tortiously interfering threats of suit and actual suits. Moreover, an absolute privilege would close the courthouse door completely to a plaintiff seeking redress for "an injury done" by the filing of a frivolous, interfering suit. In contrast, a qualified privilege maintains open access to the courthouse for "every person." Lastly, Rally's acknowledged in the court of appeals that Texas law permits a defendant in a meritless suit to "sue for malicious prosecution" (Brief of Appellee, p. 28), yet Rally's fails to explain why it is permissible under the Texas constitution to assert the tort of malicious prosecution but supposedly not permissible to assert the tort of tortious interference.

The predominance of state law issues further supports denial of the writ.

F. The Interlocutory Status Of This Case Militates Against Review.

The Fifth Circuit vacated the district court's order granting summary judgment and remanded this cause for trial on the merits. Any claimed error regarding the ultimate determination of Rally's liability can be challenged later.

II.

There Is Not A "Wide Split" Among The Circuits About Whether A Rule 56(f) Request For A Delay In Consideration Of A Motion For Summary Judgment Must Always Be Supported By An Affidavit, And In Any Event An Affidavit Was Submitted In This Case.

Rally's argues that the Fifth Circuit "ruled" in this case that a Rule 56(f) affidavit is not required and that this ruling evidences a "wide split" among the circuits on this point. Petition, p. 14. For several reasons, however, this argument does not merit certiorari review.

First, the Fifth Circuit's reversal of the summary judgment rendered by the trial court rested on a ground independent of its holding that the district court should have granted Shortstop's Rule 56(f) request. Specifically, the Fifth Circuit held that Rally's motion for summary judgment on the affirmative defense of privilege to interfere, as to which Rally's bore the burden of proof, raised an issue of intent and state of mind which was inappropriate for summary judgment. 939 F.2d at 1264-66.

In addition, Rally's petition is silent about the particular circumstances in which the Rule 56(f) request arose in this case. Discovery was still in progress when Rally's moved for summary judgment, and Shortstop's initial response to the motion invoked Rule 56(f) and pointed out that critical depositions were scheduled *that week*. (R. 1818). Rally's had continually resisted efforts to discover documents, interrogatory answers, and testimony about Rally's purported good faith in filing the Arkansas lawsuit. (R. 1112, 1123-24, 1143-52, 1272-94, 1332-53). Rally's resisted by asserting attorney-client privilege, but made

clear that it waived the attorney-client privilege *to the extent that it would assist Rally's in establishing its affirmative defense*. (R. 1333).

After the filing of Shortstop's initial response to Rally's motion for summary judgment but *before* the district court had ruled on the motion, a magistrate judge to whom the discovery dispute had been referred ruled that Rally's had waived its claim of attorney-client privilege with respect to its affirmative defense and ordered Rally's to produce documents and testimony pertinent to Rally's intent in filing the Arkansas lawsuit. (R. 944). Shortstop then promptly submitted a supplemental response to Rally's motion for summary judgment explaining the circumstances giving rise to a need for additional time under Rule 56(f) and supported that request with an affidavit. (R. 786; Supp. R.). Meanwhile, Rally's appealed the magistrate judge's order to the district court. (R. 695). Later, in a pleading concerning discovery, Rally's made a statement confirming the pertinence of the unproduced documents to the issue of good faith:

> Plaintiffs have attempted to take the depositions of Rally's former and present counsel regarding Rally's 'good faith' in filing its Arkansas lawsuit. . . . Similarly, production of privileged documents would be pointless since those documents only concern Rally's good faith in filing its suit.

(R. 276). Nonetheless, the district court never ruled on Shortstop's Rule 56(f) request or on Rally's appeal from the magistrate judge's order. Under these circumstances, the Fifth Circuit's holding about the Rule 56(f) request was eminently correct. 939 F.2d at 1267-68.

Finally, although a few circuit court opinions have expressed a difference in view about the narrow issue of whether an affidavit is *always* required to sustain a Rule 56(f) request, Rally's assertion that there is a "wide split" overstates the situation. In instances when a court has stated that an affidavit is required, there usually have been other circumstances supporting denial of the Rule 56(f) request, and the circuit court often has discussed the request on the merits. *See, e.g., Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 780-81 (3rd Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Radich v. Goode*, 886 F.2d 1391, 1399 (3rd Cir. 1989) (Hutchinson, J., concurring). This issue does not appear to be creating significant problems or controversies around the country, and, in any event, the instant case is not an appropriate vehicle for addressing the issue.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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